Supreme Court, U.S.
FILED
JUN 11 1997
CLERK

No. 96-779

UNITED STATES SUPREME COURT

October Term 1996

The Arkansas Educational Television Commission , et al

Petitioner

-against-

Ralph P. Forbes

Respondent

On writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief of Amicus Curiae, Eugene McCarthy & Larry Agran

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TABLE OF AUTHORITIES CITED

COURT DECISIONS CITED

American Party of Texas v. White, 415 U.S. 767 94 S.Ct. 1296 (U.S.Tex. 1974) Pages 3, 10, 22

Anderson v. Celebrezze, 460 U.S.780, 103 S.Ct. 1564 460 U.S. 780, 75 L.Ed.2d 547 (U.S.Ohio 1983) Pages 10, 18

Anderson v. U. S. 417 U.S. 211, 94 S.Ct. 2253 (U.S.W.Va. 1974) Pages 1, 6, 15

Austin v. Michigan Chamber of Commerce., 494 U.S. 652, 110 S.Ct. 1391(U.S.Mich. 1990) 108 L.Ed.2d 652, 58 USLW4371 Decided March 27, 1990. Page 18

Board of Educ.,Island Trees Union Free School Dist. No. 26 v. Pico, 102 S.Ct. 2799, 457 U.S. 853, 73 L.Ed.2d 435, 4 Ed. Law Rep. 1013, 8 Media L. Rep. 1721, (U.S.N.Y. 1982) Page 9

Buckley vs. Valeo. 424 U.S. 1, 46 96 S.Ct. 612, L.Ed.2d 659, 76-1 USTCP 9189. Pages 11, 19, 20, 21, 22

Burson v.Freeman, 504 U.S. 191, 112 S.Ct. 1846 (U.S. Tenn. 1992) 119 L.Ed.2d 5, 60 USLW 4393, 20 Media L. Rep. 11 37 Decided May 26, 1992 Page 14, 17

Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 860, Pages 21, 28

Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (U.S.Ill. 1980) Decided June 20, 1980: Page 26

Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 104 S.Ct. 2118, 80 L.Ed.2d 772 (U.S.Cal. 1984 Decided May 15, 1984, Page 16

Columbia Broadcasting System, Inc. v. Democratic Nat. Committee, 412 U.S. 94, at 115, 93 S.Ct. 2080 (U.S.Dist.Col.

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CBS, Inc. v. F.C. C., 101 S.Ct. 2813, 453 U.S. 367, 69 L.Ed.2d 706, 7 Media L. Rep. 1563 (U.S.Dist.Col. 1981) Page 11

William Cousins et al., Petitioners, v. Paul T. Wigoda et al. 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (U.S.Ill. 1975) Page 5

Dent v. West Virginia, 129 U.S. 114, 121-122, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889). Page 18

Donovan v. Pennsylvania Co., 199 U.S. 279, 26 S.Ct. 91, 50 L.Ed. 192 (U.S.Ill. 1905) Page 14

Eu v. San Francisco 489 U.S. at 228-9, 109 S.Ct. 1023 Page 18

Forbes v. Arkansas Education Television Communication Network Foundation, et al KHBS TV, KHOG TV; American Broadcasting Company 22 F3d 1423, (8th Cir 1994) Cert. denied. 115 S.Ct. 1962, (U.S. 1995) 131 L.Ed.2d 853, 63 USLW 3812, 63 USLW 3817 No. 94-1566. Page 23

Ralph P Forbes v. The Arkansas Education Television Commission et. al. KHBS TV, KHOG TV; American Broadcasting Company 24 Med L. Rep 2295 No 95-2722WA August 21, 1996 Page 24

Fulani v. Brady 809 F.Supp. 1112, S.D.N.Y. Jan. 5, 1993 Page 28

Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-216, 13 L.Ed.2d 125 (1964). Page 12

Hague v. C.I.O. Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (U.S.N.J. 1939) Page23

Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678, 491 U.S. 657, 105 L.Ed.2d 562, 57 USLW 4846, 16 Media L. Rep. 1881 (U.S.Ohio 1989) Page 8

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S., at 647, 101 S.Ct., at 2563-2564, Page 16

Irwin v. Dixon, 50 U.S. 10, 9 How. 10, 13 L.Ed. 25 (U.S.Dist.Col. 1850) Page 14

LaRouche v. Kezer, 787 F.Supp. 298, (U.S.Dist.Ct., D. Conn. Feb. 28, 1992. Memorandum of Decision on Motion for Reconsideration March 9, 1992. Page 22

Lebron v. National R.R. Passenger Corp. (Amtrak), 12 F.3d 388, (C.A.2 (N.Y.) 62 USLW 2423 Decided Dec. 27, 1993. Page 28

Lowe v. S.E.C. 472 U.S. 181, 105 S.Ct. 2557, 86 L.Ed.2d 130, 53 USLW 4705, Fed.Sec.L.Rep. P 92,062 (U.S.N.Y. 1985) Page18

Lowenstein v. Larkin, 40 A.D.2d 604, 335 N.Y.S.2d 799(N.Y.A.D. 2 Dept. 1972) Page 19

Lubin v. Panish, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702 (1974). Page 11

McCoy v. Union Elevated R. Co., 247 U.S. 354, 38 S.Ct. 504, 62 L.Ed. 1156 (U.S.Ill. 1918) Page 14

Monitor Patriot Co. v. Roy, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971). Page 13

New York Times Company, v. L. B. Sullivan, Ralph D. Abernathy et al., 376 U.S. 254, 84 S.Ct. 710, 95 A.L.R.2d 1412, 11 L.Ed.2d 686, 1 Media L. Rep. 1527 (U.S.Ala. 1964) Page 3

Nixon v. Herndon 273 U.S. 536 (1927). Pages 8, 31

Oregon v. Mitchell, 91 S.Ct. 260, 400 U.S. 112, (U.S.Or. 1970) 27 L.Ed.2d 272 Decided Dec. 21, 1970. Page 10

Red Lion Broadcasting Co. v. FCC, supra, 395 U.S., at 390, 89 S.Ct., Pages 11, 17

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Reitman v. Mulkey, 387 U.S. 369, 378, 87 S.Ct. 1627, 1632, 18 L.Ed.2d 830 (1967) Page 28

Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964) Pages 10, 17

Roberts v. City of New York, 295 U.S. 264, 55 S.Ct. 689, 79 L.Ed. 1429 (U.S.N.Y. 1935) Page 14

Schware v. Board of Bar Examiners, 353 U.S. 232, 239, 77 S.Ct 752, 756, 1 L.Ed.2d 796 (1957). Page 15

Sheppard v. Maxwell, 384 U.S. 333, 361-363, 86 S.Ct. 1507, 1521-1522, 16 L.Ed.2d 600 (1966) Page 17

Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757 , 151 A.L.R. 1110, 88 L.Ed. 987 (U.S.Tex. 1944) Pages7, 26, 27, 28

Tashjian v. Republican Party of Connecticut, 107 S.Ct. 544, 479 U.S. 208, 55 USLW 4057 (U.S.Conn. 1986) Decided Dec. 10, 1986. Pages 5, 7

United States v. Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, Pages 1, 6, 7, 10

Wesberry v. Sanders, 376 U.S. 1, 17, 84 S.Ct. 526 11 L. Ed.2d 481 (1964) Page 17

Whitney v. California 274 U.S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 Page 9

Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5,21 L.Ed.2d 24 (U.S.Ohio 1968) Pages 3, 11, 22

TABLE OF LAWS CITED

United States Constitution Article I, Section 2 Page 7

United States Constitution Article II, Section 1 Page 7, 8

United States Constitution, 1st Amendment Page 18, 26

United States Constitution, 5th Amendment Page 24

United States Constitution 14th Amendment Pages 25, 26

United States Constitution 20th, the 22nd, the 23rd and 24th Amendments Page 9

New York State Constitution Art II, Sec 8(enacted 1894) Page 15

New York State Education Law Page 13

New York State Election Law (Saxton Act of 1890). Page 16

New York State Town Law Page 13

New York State Village Law Page 13

Federal Communications Act, 47 USC Sec. 315 Pages 21, 29

Federal Communications Act, 47 USC Sec. 312(a)(7) Page 14

TABLE OF OTHER WRITINGS CITED

A People in Revolution The American Revolution and Political Society in New York (1760-1790) Edward Countryman. Page 15

Address to Citizens of Albemarle County by Thomas Jefferson 2/12/1790 Lib Cong 53:9021-2 Page 7

American Revolutionaries in the Making, Political Practices in Washington's Virginia, by Charles S. Sydnor, Publisher The Free Press Page 14

Articles of Impeachment of President Nixon Page 12

By Invitation Only, How the Media Limit Political Debate by David Croteau and William Hoynes, Sociology Professors, Univ.

of Richmond & Vassar College Publisher Common Courage, Monroe Maine, 1994 Page 5

Breaking The News, How the Media Undermine American Democracy by James Fallow, Publisher Vintage Press Page 5

The Buying of the President by Charles Lewis and the Center for Public Integrity, Publisher Avon Books 1996 Page 7, 22

Common Sense by Tom Paine Pages 7

Decline of Aristocracy in the Politics of New York (1801-1821) Dixon Ryan Fox.. Page 15

Democracy and the Problem of Free Speech by Cass R. Sunstein Karl LLewellyn Professor of Jurisprudence, University of Chicago, Law School, Publisher The Free Press 1995 Page 22

Extra, Vol 8, No, 6,. Page 6

Federalist Papers #47 Page 21

Federalist Papers #49 Page 9

Federalist Papers #57 Pages 13, 20, 21

Federalist Papers #84 Page 13

"Getting on the Media Agenda–a Case Study in Competing Logics of Campaign Coverage" by Professor Joshua Meyrowitz, professor of communications at the University of New Hampshire, which is Chapter 2, pg 35 et seq of a book entitled "Political Campaign Discourse, The Problem of" by Kathleen Kendall, SUNY Press, 1996. Pages 3 , 30

Glascow Herald, Larry Lamb 5/24/95, Pages 5, 6

The Irony of Free Speech by Owen M. Fiss, Sterling Professor of Law, Yale Law School, Publisher Harvard University Press, 1997 Page 22

Messages of Governor Hill 1890. Page 14

New York Times of Sunday, January 26th 1997, National section, page 14, col.1 Article by-Line Kevin Sack Page 20

New York Times of Thursday March 27th 1997 Op-Ed article by Former Senator Robert Dole on page A-23 Pages 24, 25

Novo Ordo Seclorum –The Intellectual Origins of the Constitution" by Forrest Mc Donald Page 3

Out of Order, How the Decline of the Political Parties and the Growing Power of the News Media Undermine the American Way of Electing Presidents by Thomas E. Pattersom. Professor Maxwell School, Syracuse Univ written as visiting Professor Harvard University, Kennedy School, Published by Alfred A Knopf 1993 Page 5

Records of 1787 Convention Farrand Edit), George Mason (Afternoon, July 17, Vol II, / Page 9, 13

Roberts Rules of Order Page 13

Melancton Smith, Speech at New York Ratifying Convention on June 21st, 1788 Page 20

1997 Statistical Abstract Tables 897 & 1381 Page 15

Tin Horns and Calico A Decisive Episode in the Emerging of Democracy by Henry Christman Page 16

Thomas Jefferson, Dumas Malone's biography of pg 129. Page 13

The Ultimate Tyranny, The majority over the majority, by Eugene McCarthy. Pages 19, 22, 29

Williston On Contracts Page 24

HIGHLIGHT OF ARGUMENTS. EXCLUSION FROM DEBATES DEFEATS A CANDIDATE, CONVEYS FALSE MESSAGES, AND DENIES VOTERS OF CHOICE

Amici, McCarthy and Agran, submit this brief (on consent of both parties) as candidates whose presidential primary campaign's were destroyed by being excluded from televised debates. We have an action below to establish such rights. We file this because of the effects your decision here may have on presidential primaries. While we urge affirmance here, we submit that the "public forum" holding of the Circuit Court on the first appeal, which limited communication rights solely to public television, is wrong. A major debate on ABC[1], we were excluded from, was simultaneously carried on public television and rebroadcast by public TV in subsequent State primaries.

The fact is, that today : 1. a decisive portion of the electorate make up their minds on how they will vote by watching candidates debates and 2.. There is no alternate effective means of communication. We do not have to argue that participation in televised debate is directly a "right per se". For it is such, as a consequence of the electorates right to intelligently cast their ballot and the nation's need for deliberative, comparative selection, which is what elections are for. It is not a free election nor any election when, as most often occurs, voters enter the polling booth and find on the ballot, names they never heard from or about, or were able to and were accordingly unable to intelligently choose between them. And this Court has held that free and fair elections are a Constitutional right[2]. (See Point I)

Secondly, we submit that a candidate has a First Amendment right to communicate; as has his rival. That a right to simultaneously speak, results in neither being heard and since the rights of the electorate are paramount, the right should be accorded in a manner most conducive to the deliberative process (i.e. counsel here is not denied free speech rights by having to sit silent during his adversaries presentation). (See Point II).

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[1] The public official sponsoring this debate held at a public college with public funds testified that ABC's president insisted on our exclusion

[2] United States v. Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368; and Anderson v. U.S. 417 U.S. 211, 94 S.Ct. 2253 (U.S.W.Va. 1974)

Thirdly, exclusion violates the neutrality principle and carries a negative message that the unheard ideas of the excluded candidate are too extreme, radical, uninformed, or stupid etc. for him/her to be included. That such a vote will be wasted. (Media never attempts to neutralize this). Nor is the excluded effectively able to rebut this, adding to his other disabilities. (See Point III)

Fourthly, because free elections is at the core of our Constitution, Government cannot be permitted to give away an exclusive license (a legal oxymoron) to all of the publicly owned airwaves to broadcasters, for nothing and require candidates to buy pieces back at enormous sums. The model of New York Times Company, v. L. B. Sullivan, Ralph D. Abernathy et al.,[3] is instructive in that this Court reversed because of the perceived effect on what you viewed the First Amendment ought to produce; vigorous and robust debate. The true historic reason for "free speech" and "free elections"; to substitute reason and deliberativeness for force, should be similarly treated. A contrary holding requires anyone seeking to promote a candidate for the Presidency, to seek the permission of the press and media. Otherwise, as happened in our case, they will be a non-candidate.

The danger from such repression, beyond the violence it can produce, is the current widespread public apathy, drop in voter turnout, participation and interest, induced by feelings of powerlessness. This is caused by the high cost of television for campaigning, the resulting need for big contributions to buy time, and the perceived "quid pro quo" to the contributors. That savvy people do not repeat such large giving, without a reward. Such is the pathway to Dictatorship, corruption and worst.

OUR FACTS ILLUSTRATE THE BROADER ISSUES HERE

Amici were two out of four candidates in most of the Democratic Party primary elections in 1992, in which there was a total information blackout to the voters, in press and media, about their candidacies. Even as to the fact that their names appeared on the machine as presidential candidates. It resulted in each getting less than 1% of the vote; withdrawn candidates getting more. Media conveyed to the electorate that there were no

[3] 376 U.S. 254, 84 S.Ct. 710, 95 A.L.R.2d 1412, 11 L.Ed.2d 686, 1 Media L. Rep. 1527 (U.S.Ala. 1964)

such candidates. Voters could find out virtually nothing about them, nor knew they existed; not till too late, after closing the voting booth curtain and seeing four levers, instead of the two they were led to expect. This, despite the fact that, as in New York, hundreds of volunteers had gone door to door statewide, in the snowy cold winter and collected thirty thousand signatures that made them ballot qualified candidates. Agran had been endorsed by an 85% vote of the Reform Democratic Clubs, Assembly, whose endorsement for 40 years has resulted in heavy primary majorities.

This Court[4] has given constitutional recognition to the right of the non-preferred candidates to get on the ballot and it is a cruel hoax, after great effort to put such names there, that the blackout made it an empty gesture. But for that blackout, we should have secured a majority of the New York delegates.

The Constitutional right of free and fair elections is the "sine qua non" of the Constitution, Forrest Mc Donald concluded in "Novo Ordo Seclorum --The Intellectual Origins of the Constitution" at page 287 .

DIRECT COMMUNUICATION FOR CANDIDATES IS NEEDED FOR FREE AND FAIR ELECTIONS

Those in control of the lines of communication have wrested the power of the electorate to nominate the President without "checks or balances" on that power. An academic study was made of our 1992 primary entitled "Getting on the Media Agenda--a Case Study in Competing Logics of Campaign Coverage" by Professor Joshua Meyrowitz,[5]. He concluded that the role free speech decisions ascribe to our media and press is unfulfilled. They do not provide the "market place of ideas", decisions say make fair elections. Their "free speech" smothers public's free elections rights. 'Free Speech" in their view, is a right of theirs, but not something they owe to the public.

[4] American Party of Texas v. White, 415 U.S. 767 94 S.Ct. 1296 (U.S.Tex. 1974) and , Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5,21 L.Ed.2d 24 (U.S.Ohio 1968) and progeny

[5] Professor of communications at the University of New Hampshire, which is Chapter 2, pg 35 et seq of " The Problem of Political Campaign Discourse," by Kathleen Kendall, SUNY Press, 1996.

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Reconciliation of competing commands of free speech and free elections is only thru direct communication with the electorate.

Meyrowitz says the media and press do not see their role as "informational", to permit the issues that confront Democratic primary voters to be debated by the candidates. Their zeal to sell newspapers and air-time causes reporters, in order to be printed by editors, to exclusively write about something they call "news". "News" is a form of "entertainment", which sees as "newsworthy", only the unique, the sensational and the bizarre. Thus "News", in election campaigns, analogizes elections to a "horse-race", in which only the "front runners" (usually two) are interesting enough to report about. "Ratpack-journalism" makes it even worst. It being unseemly for one broadcaster or newspaper to report the inaccuracy of another, they repeat and never contradict one another, falsehoods being repeated forever.

But this has nothing to do with the Democratic Party rules which provides for proportional representation in electing delegates; making the "horserace", as a model, nonsense. The effect of a slight margin of victory (say by a "nose-length") far from being "big news", is unimportant. Under Party rules, every vote is represented. A candidate receives delegates in proportion to the percentage of votes he received. Those delegates, added to delegates freed, when others drop out, or are unpledged, can produce a majority and nominate a President. A candidate able to toll 15%, has that vote preserved intact, through the Convention. We do not have "winner take all" primaries, the "horserace" paradigm is false, and as shown below, they knew it.

Amici was excluded from debates from the outset in New Hampshire, when Amici was high in the polls, which quickly ended that. But the results in rural New Hampshire is no test as to how Democratic voters in the inner cities or suburbs of New York will respond 3 weeks later. A candidate not placing first or second in New Hampshire in 1992, like Agran, who was organized and championing urban issues of strong appeal in New York, and won the delegate vote of 85% of the Reform clubs there, which historically assured a huge majority vote was, by any standards a more significant contender than Clinton. Nevertheless, he was still denied access to the debate and any press or Media in New York, which destroyed his campaign

thereafter. The 1992 New York voter was, by this blackout, given uncontradicted false information by and in a monopolistic denial of the right of free elections.

Other important choices were also foreclosed. In each primary, the delegates are elected to enact the rules for future delegate selection. Rules beyond the reach of State or State high courts,[6] that can improve the process next time, usually favored by non-lead candidates. They can influence, debate, shape platform, sit on committees, elect the national committee and even work out unity though November. Not an exciting incident of a "horserace", the electorate was blacked out from this too.

Many recent books argue that the current system of having the press serve as the sole intermediary between candidates and the electorate is the deathknell of our Democracy. A Harvard Kennedy Center study argues that, because of this, the electorate cannot be informed and primary elections[7] should end.

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[6] William Cousins et al., Petitioners, v. Paul T. Wigoda et al, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (U.S.Ill. 1975) and Tashjian v. Republican Party of Connecticut, 107 S.Ct. 544, 479 U.S. 208, 55 USLW 4057 (U.S.Conn. 1986)

[7] Out of Order, How the Decline of the Political Parties and the Growing Power of the News Media Undermine the American Way of Electing Presidents by Thomas E. Patterson, Professor Maxwell School, Syracuse Univ written as visiting Professor Harvard University, Kennedy School, Published by Alfred A Knopf 1993 . This was largely a study of the 1992 Presidential primary. He concludes that McCarthy's reforms to the primary process placement of the power of selection in the hands of the primary voters, involving the use of the press and media as an intermediary, was wrong in that the news media is ill suited to that purpose. Some others are:
Breaking The News, How the Media Undermine American Democracy by James Fallow, Publisher Vintage Press
By Invitation Only, How the Media Limit Political Debate by David Croteau and William Hoynes, Univ. of Richmond & Vassar College Publisher Common Courage, Monroe Maine, 1994

C-Span has had innumerable programs on this topic including those by Free TV For Straight Talk Coalition of Paul Taylor and Common Cause. A study in England shows how Rupert Murdock was able to engineer the election of Prime Minister Margaret Thatcher through his monopoly control over the press. Glascow Herald, Larry

POINT ONE

THE CORE OF OUR CONSTITUTION, GOVERNANCE THROUGH "REASON", WITH ELECTIONS AS ITS MEANS, REQUIRES VOTER SELECTION AFTER FULL DIRECT ACCESS TO INFORMATION FROM ALL CANDIDATES,

The holdings of United States v. Classic[8] and Anderson v. U.S.[9] are:

1. That there is a Constitutional right to free, and fair elections.
2. That this is a protection against anyone's interference, in any form not merely that by government.

United States v. Classic, supra holds:

> "It is no extension of the criminal statute, as it was not of the civil statute in Nixon v. Herndon, supra, to find a violation of it in a new method of interference with the right which its words protect. For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury and oppression."

This was applied in Anderson v. U.S. supra where the interferors were not "state actors", but candidates for local office having no connection to government whatever. The Court said:

> "The right to an honest (count) is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States.[Cases cited]

Elections are for converting "reason" into "governance" and not a "horserace". John Locke "invented" our form of government; "a republic", whose main binding force is "reason" (not physical force as in older forms). All branches to be chosen through "reason", and deliberativeness, in "free elections", selecting officials who, too, would operate through reason.

Lamb 5/24/95, Extra, Vol 8, No, 6, pg 16. There are many areas of this country today where candidates are at the mercy of the press.

[8] 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368,

[9] 417 U.S. 211, 94 S.Ct. 2253 (U.S.W.Va. 1974)

It's found in the Declaration of Independence's "consent of the governed" phrase, Tom Paine's Common Sense's discourse on voting and the following from Thomas Jefferson's Address to The Citizens of Albemarle County and a catalogue more:

> "...It rests now with ourselves alone to enjoy in peace and concord the blessings of self-government, so long denied to mankind; to shew by example the sufficiency of human **reason** for the care of human affairs and that the will of the majority, the Natural law of every society, is the only sure guardian of the rights of man. Perhaps even this may sometimes err. But its errors are honest, solitary and short-lived,--Let us then, my dear friends, for ever bow down to the general **reason** of the society. We are safe with that, even in its deviations, for it soon returns again to the right way..." [10] (emphasis supplied)

Article II, Section 1 of the Constitution did not originally mandate the election of the Presidential electors though it shortly became universal. Later amendments (the 20th, the 22nd, the 23rd and the 24th) treat it as required. The provisions for election under the Constitution is construed very broadly to achieve its purpose and thus includes primaries. In Tashjian v. Republican Party of Connecticut supra the term "election" of Congressman was held to include state primaries for federal office.[11]

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[10] Delivered on leaving Monticello to become Secretary of State under President George Washington 2/12/1790 Lib Cong 53:9021-2

[11] "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice," the requirements of Article I, Sec. 2, cl. 1, and the Seventeenth Amendment apply to primaries as well as to general elections. United States v. Classic, supra, at 318, 61 S.Ct., at 1039; see Smith v. Allwright, 321 U.S. 649, 659-660, 64 S.Ct. 757, 762-763, 88 L.Ed. 987 (1944). The constitutional goal of assuring that the Members of Congress are chosen by the people can only be secured if that principle is applicable to every stage in the selection process. If primaries were not subject to the requirements of the Qualifications Clauses contained in Article I, Sec. 2 and the Seventeenth Amendment, the

Like a great many other terms in the main body of the Constitution, the term "election" can best be understood as the implementation of Locke's plan. Thinkers prior to him maintained that the legitimate source of "Law." was "God", that Kings, being the descendants of King David, articulated "Law" on behalf of God and that obedience to "law" had to be secured through "force". Locke argued in the words of the Declaration of Independence, that Governments are instituted among men by the consent of the governed and that governments are held together by "reason" and not "force"

"Elections" to Lockians, like Jefferson and Madison, was the process by which "deliberation" and "reason" was transformed into governance. The term "election" in the body of the Constitution could not derive its meaning from any of the bills of rights, simply because they hadn't been adopted yet. Therefor the word "election" wasn't dependent on nor derive its meaning from the First Amendment which is read as a restriction as to "state action". Madison tells the role of "reason" and "deliberativeness" in elections in his famous statement quoted in Harte-Hanks Communications, Inc. v. Connaughton[12] asserts:

> "..As Madison observed in 1800,[13] just nine years after ratification of the First Amendment:
>
> "Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the

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fundamental principle of free electoral choice would be subject to the sort of erosion these prior decisions were intended to prevent.

" [9] Accordingly, we hold that the Qualifications Clauses of Article I, Sec. 2, and the Seventeenth Amendment are applicable to primary elections in precisely the same fashion that they apply to general congressional elections. ...."

[12] 109 S.Ct. 2678, 491 U.S. 657, 105 L.Ed.2d 562, 57 USLW 4846, 16 Media L. Rep. 1881 (U.S.Ohio 1989)

[13] [Ed. Actually made to the Virginia Legislature]

> candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." 4 J. Elliot, Debates on the Federal Constitution 575 (1861)."

Madisons answer to Jefferson's proposal on amending the constitution in Federalist Papers #49 is pertinent

> " But it is the reason, alone of the public, that ought to control and regulate the government." (emphasis supplied)

There is a major price to be paid for denial of that right of "free election" said Madison, as quoted in Board of Educ..Island Trees Union Free School Dist. No. 26 v. Pico, [14]

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

Mr. Justice Brandeis went back to the Locke's thesis on the operation of "reason" in Whitney v. California [15] in paraphrasing John Locke thusly:

> "Those who won our independence believed * * * that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely

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[14] 102 S.Ct. 2799, 457 U.S. 853, 73 L.Ed.2d 435, 4 Ed. Law Rep. 1013, 8 Media L. Rep. 1721, (U.S.N.Y. 1982)

[15] 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095

supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." (Emphasis supplied)

As the term election is construed broadly, a free and fair election is one where there are no restrictions on that right. Oregon v. Mitchell, [16] this Court said:

"It was in that tradition that we said in Reynolds v. Sims, supra, 377 U.S., at 555, 84 S.Ct., at 1378, 'The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.'

"This 'right to choose, secured by the Constitution,' United States v.Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, is a civil right of the highest order. Voting concerns 'political' matters; but the right is not 'political' in the constitutional sense."

And after years of the Courts expanding the "right of ballot access", (American Party of Texas v. White[17]) what a mockery it would be to tell a candidate, that after bearing the burden of collecting hundreds of thousands of signatures, his rights extended no further than having his name printed on the ballot, to be seen too late to do any good. Candidacies serves the purpose, not merely to "win" the election, but to cause other candidates to address issues. Anderson v. Celebrezze, [18] says:

"As we have repeatedly recognized, voters can assert their preferences only through

[16] 91 S.Ct. 26,0 400 U.S. 112, 27 L.Ed.2d 272 (U.S.Or. 1970).
[17] 415 U.S. 767 (1974))
[18] 460 U.S.780, 103 S.Ct. 1564.(U.S.Ohio 1983)

candidates or parties or both. "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." Lubin v. Panish, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702 (1974). The right to vote is "heavily burdened" if that vote may be cast only for major-party candidates at a time when other parties or other candidates are "clamoring for a place on the ballot." Ibid.; Williams v. Rhodes, supra, 393 U.S., at 31, 89 S.Ct., at 10. The exclusion of candidates also burdens voters' freedom [460 U.S. 788] of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens. (FN8)"

In CBS, Inc. v. F.C. C., [19] this Court said:

"It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market .... It is the right of the public to receive suitable access to social, political esthetic, moral, and other ideas and experience which is crucial here." Red Lion Broadcasting Co. v. FCC, supra, 395 U.S., at 390, 89 S.Ct., at 1806 (citations omitted)

...We have recognized that "it is of particular importance that candidates have the ... opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." Buckley v. Valeo, 424

[19] 101 S.Ct. 2813, 453 U.S. 367, 69 L.Ed.2d 706, 7 Media L. Rep. 1563 (U.S.Dist.Col. 1981)

U.S. 1, 52-53, 96 S.Ct. 612, 651, 46 L.Ed.2d 659 (1976). Indeed, "speech concerning public affairs is ... the essence of self-government," Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-216, 13 L.Ed.2d 125 (1964). The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." Monitor Patriot Co. v. Roy, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971). Section 2(a)(7) thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."

They quoted the Supreme Court of Kansas, as follows: [20]

'(I)t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great."

The Articles of Impeachment of President Nixon were framed around the Constitutional Right of Free Elections

POINT ONE-A

TILL RECENTLY, CANDIDATES HAD EFFECTIVE DIRECT ACCESS TO VOTERS. TELEVISION REPLACED THAT.

Indeed, ask any schoolchild how it works. First nominations, then speeches, then balloting. And that's the way elections have been conducted historically.

From the very outset of our "Democratic Institutions", campaigning and voting were inseparably linked. From Rev.

[20] Burch J,. (78 Kan., at 724, 98 P., at 286):

Hooker's first Town meeting, in Hartford, Connecticut, to every organization in our society today, through Robert's Rules, elections are conducted at a meeting, by speech making followed by the casting and counting of votes. Jefferson, for instance, was elected a state legislator at a meeting. (1 Dumas Malone's biography of Thomas. Jefferson pg 129). The New York Town Law, the Village Law and the Education Law provide elections at such meetings and Art II, Sec 8 of the State Constitution (enacted 1894) exempted these from the other procedures of general elections. In such a system, "communication" with the voters is direct. The higher the office, the larger the constituency & area, the greater the need for television for effective communication.

The founders recognized this. Hear the words of George Mason at the 1787 Convention,[21] a staunch proponent of popular government, arguing against direct popular elections of the President (as did the others) thusly, right before the nine to one and then ten to zero vote against it:

"...a government which is to last ought at least to be practicable. Would this be the case if the proposed election should be left to the people at large. He conceived it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.---" (emphasis supplied)

Indeed, Madison (Federalist #57) and Hamilton (ibid # 84) denied the Anti-Federalists charge that the size of the country made an informed electorate for Congress impossible. What Mason had in mind, as to a requisite system to judge of the "pretensions" of candidates, was undoubtedly the procedure then in effect. Election day then, was made "fair day", a holiday and festival to attract voters to the County seat, the one voting place, where candidates had the opportunity to speak with

[21] Afternoon, July 17, Vol II, page 31 Records of 1787 Convention ,Farrand Edition

voters[22] There has, historically never been any movement to dispense with this due-process notion of judging of candidates.

By 1890, the few large polling places made identification by poll-watchers difficult and opportunities for voter fraud greater. The Australian Ballot fraud-proof or "official ballot" cast in a coercion-proof "polling place" requiring "electioneering" to cease 100 feet beyond, was to prevent fraud and coercion prevalent then, not to deny free speech, or "free elections"[23].

At the founding, "communication" came about through "transportation". "Transportation" was over "highways" (which included rivers and seas) which the common-law held were public, and not only open to all, but it was a "pourpresture" (a crime) for any-one to obstruct them.[24] [In Point two-A, we discuss the "trust" nature of these public rights, which this Court assimilated into the "public forum doctrine", misapplied below."]

Where the public highways crossed and "town squares" were laid out, they too, "by judge made law" became encumbered with the same "public easements" or "public incorporeal heriditaments". Preserved in these were "light[25], air and access, (ingress and egress[26])" , prospect and view.[27] They became the local "Hyde Park" or "Union Squares", open to candidates and ideas of all persuasions. Candidates for public office could reach the voters on a "soap-box" in the town square.

Television has taken the place of the streets and the town square, to which in the old days, the Courts fashioned doctrines of public and private easements by "dedication", "prescription", "presumed lost-grant", "implied offer" or "estoppel". The filing

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[22] American Revolutionaries in the Making. Political Practices in Washington's Virginia, by Charles S. Sydnor, Publisher Free Press.

[23] Messages of Governor Hill 1890. See Burson v.Freeman, infra..

[24] Irwin v. Dixon 50 U.S. 10, 9 How.10, 13 L.Ed. 25 (U.S.Dist.Col. 1850)

[25] A then known part of the electromagnetic spectrum .

[26] Extends into "the system of intersecting streets" and ties each occupant into the community for travel and communication .

[27] Donovan v. Pennsylvania Co., 199 U.S. 279, 26 S.Ct. 91, 50 L.Ed. 192 (U.S.Ill. 1905) McCoy v. Union Elevated R. Co., 247 U.S. 354, 38 S.Ct. 504, 62 L.Ed. 1156 (U.S.Ill. 1918) Roberts v. City of New York, 295 U.S. 264, 55 S.Ct. 689, 79 L.Ed. 1429 (U.S.N.Y. 1935)

of a map causes a dedication, which was required before subdivision was permitted, created these public rights in the Town Square and afforded a means of communication for candidates, that was fully adequate for the democratic system then. In the 1992 Democratic Primary for President, the "right" of a candidate to speak in the town square or public streets no longer afforded an adequate means of communicating with the voters and we come back to the Courts whence this right of communication of the community was first recognized. Today 99% of all households and 9 out of ten individuals have color television, and spend 40% of their leisure time watching same.[28] Candidates (and democracy) must go where the people are.

FREE SPEECH, EDUCATION AND THE FRANCHISE INSEPARABLE

Pennsylvania, in July 1776, in immediate response to Congress's request of the revolutionary committees in the former colonies to do so, was the first to draw up a State Bill-of Rights. It adopted a free-speech guaranty for its Constitution, which until copied by Vermont a few years later, was the only state to then do so. New York did it in 1821. All three states coupled a free-speech with a universal suffrage and a guaranteed support for free public education provision, as a triad; free elections, free-speech and free education. The Virginia ratifying Convention's requirement that Madison put Pennsylvania's free-speech provision (among others) in the Bill of Rights and the 1787 Conventions provisions for elections was an act of trust in "the common man", giving him the vote, to steer this country. For New York in 1787 had 90% illiteracy, slavery, "indentured servants", "tenant farmers" on "entailed" land, (feudalism) a large "poor house" and debtors prison population, persecuted Indians, agrarian revolt (Vermont succeeding); 10 percent of white males being eligible[29] In 1821 it adopted universal white

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[28] 1997 Statistical Abstract pages, Table 897 & 1381

[29] A People in Revolution The American Revolution and Political Society in New York (1760-1790) Edward Countryman. "Universal white manhood suffrage" in the 1821 State Constitution initiated later reforms. Decline of Aristocracy in the Politics of New York (1801-1821) Dixon Ryan Fox. The Calico Rebellion of 1846 resulted in further

male suffrage. The Fifteenth amendment, likewise, in giving Afro-Americans the franchise, simultaneously enacted the reconstruction statutes, requiring the secessionist states to constitutionally guaranty free public school education . Elections require educated choice, which only television today provides.

POINT ONE-B

"RESTRICTIONS ON CANDIDATES COMMUNICATIONS ARE INVALID, WHERE THE REMAINING MEANS ARE INADEQUATE,.

The government should not be able to give a monopoly of an airwave, owned by the public, which impedes a candidates access to them, where that is the only adequate means of communication to the electorate. It is a twentieth century pourpresture. A denial of "free election" guaranties,

In Members of City Council of City of Los Angeles v. Taxpayers for Vincent, [30]this Court said:

> "While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S., at 647, 101 S.Ct., at 2563-2564, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate. (citations omitted)

POINT ONE-C

ASSUMING CONFLICT CAN NOT BE HARMONIZED, THE RIGHTS OF FREE ELECTIONS DOMINATE.

There is no conflict between the right to free and fair elections and First Amendment rights, but assuming a conflict should occur and that it could not be harmonized we respectfully submit that the latter would have to yield to the former, that the publics right of free elections is of paramount concern.

Constitutional reforms. Tin Horns and Calico A decisive episode in the emerging of Democracy by Henry Christman

[30] 466 U.S. 789 104 S.Ct. 2118, 80 L.Ed.2d 772 (U.S.Cal. 1984 Decided May 15, 1984

In Columbia Broadcasting System, Inc. v. Democratic National Committee, [31]it was said:.

> "... '(i)t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.' Red Lion, supra, at 390, 89 S.Ct., at 1806."

Burson v.Freeman, [32] permitted the blanket total prohibition of electioneering within 100 feet of the polls.

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[31] 412U.S. 94, at 115, 93 S.Ct. 2080, 36 L.Ed.2d 772, 1 Media L. Rep. 1855 (U.S.Dist.Col. 1973)

[32] 504 U.S. 191, 112 S.Ct. 1846 119 L.Ed.2d 5, 60 USLW 4393, 20 Media L. Rep. 11 37 (U.S.Tenn. 1992)

Said the Court:

> "Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings. See, e.g., Sheppard v. Maxwell, 384 U.S. 333, 361-363, 86 S.Ct. 1507, 1521-1522, 16 L.Ed.2d 600 (1966) (outlining restrictions on speech of trial participants that courts may impose to protect an accused's right to a fair trial). This case presents us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote--a right at the heart of our democracy."
>
> "This Court has recognized that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society." Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964)."
>
> "'No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964)'".
>
> "Accordingly, this Court has concluded that a State has a compelling interest in protecting voters from confusion and

Lowe v. S.E.C. [33]involved an SEC order forbidding an unregistered adviser from publishing newsletters containing investment advice, that is not specifically tailored to the needs of individual clients. It too discussed the numerous determinations where First Amendment rights were held subordinated to a superior right, or a "compelling state interest" "for the protection of society", among them, the right to express a legal opinion without a license; to practice law.

In Austin v. Michigan Chamber of Commerce,[34] the constitutional right of speech, implicit in campaign contributions, was prohibited to Corporations as an anti-fraud device.

POINT TWO

DEBATE EXCLUSION VIOLATES FIRST AMENDMENT

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undue influence. " See Eu, 489 U.S., at 228-229, 109 S.Ct., at 1023. "The Court also has recognized that a State "indisputably has a compelling interest in preserving the integrity of its election process." Id., at 231, 109 S.Ct., at 1024. The Court thus has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." Anderson v. Celebrezze, 460 U.S. 780, 788, n. 9, 103 S.Ct. 1564, 1570, n. 9, 75 L.Ed.2d 547 (1983) (collecting cases). In other words, it has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process.

[33] 472 U.S. 181, 105 S.Ct. 2557, 86 L.Ed.2d 130, 53 USLW 4705, Fed. Sec. L. Rep. P 92,062 (U.S.N.Y. 1985)

"The Court determined long ago that although "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, ... there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed ... for the protection of society." Dent v. West Virginia, 129 U.S. 114, 121-122, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889). Regulations on entry into a profession, as a general matter, are constitutional if they "have a rational connection with the applicant's fitness or capacity to practice" the profession. Schware v. Board of Bar Examiners, 353 U.S. 232, 239, 77 S.Ct 752, 756, 1 L.Ed.2d 796 (1957)."

[34] 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652, 58 USLW 4371 (U.S.Mich. 1990).

"Free speech", is not a license to commit fraud[35]. Exclusion of candidates from communications rights invariably carries a message that is fraudulent and fatal to the excluded candidate. It harms Broadcasters not. Viewing audiences are large. Barry Diller C.E.O. of Fox Broadcasting told the National Press Club Luncheon on April 17, 1997 that Broadcasters lose nothing and only make money from debates. Exclusion of rival candidates to favored ones has a value at "pay-back" time.

A Broadcasters role as speaker or of music maker or of sit-com maker or otherwise creator or originator of broadcasts is, as with Cable companies, separate from its role of operator of the transmission equipment and exclusive control over the airwaves. But Broadcasters claim to absolute and total control of both, for every second and minute of every day, as a "free speech" right. Airing of their hilarious "sit-coms" however, can be delayed. But, how about the electorates and candidates free speech rights? Their not the only one to have "free-speech" rights. We all have.

First, lets deal with the candidates alone. This is the proverbial second shoe awaited to be dropped from the decision Amici McCarthy procured in Buckley vs. Valeo. 424 U.S. 1, 46 96 S.Ct. 612, L.Ed.2d 659, 76-1 USTCP 9189. He brought that suit with former Senator James Buckley, supporting the principal Constitutional contention (and main holding,) as this Court put it:

> "In appellants' view, limiting the use of money for political purposes constitutes a restriction on communication violative of the First Amendment, since virtually all meaningful political communications in the modern setting involve the expenditure of money".

Amici argued the unconstitutionality of the statute involved, by virtue of the total abridgment of the right to communicate to the electorate (the same prohibited result here) on reaching the expenditure limit. Amici's Counsel's opening argument, as recorded in his book The Ultimate Tyranny. The majority over the majority, by Eugene McCarthy. Page 50 was:

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[35] The misrepresentation that the excluded candidates were not on the ballot is similar to Lowenstein v. Larkin, 40 A.D.2d 604, 335 N.Y.S.2d 799(N.Y.A.D. 2 Dept. 1972) giving the wrong polling places locations.

"A candidate who had reached the expenditure limit was prohibited from spending another penny to make his political views known. He could not issue a press release, mail a letter, or hire a secretary to type one. He could not hire a hall to make a speech or make a long distance telephone call"

The Court thus held:

"A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."

Surely this Court would never hold that this right of communication extends only to the wealthy Madison in Federalist Papers #57 said otherwise:

"Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of the country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people." (emphasis supplied)

This was his answer to such anti-federalist arguments as Melancton Smith's New York Convention one on June 21st 1788.

This Court, in Buckley supra , declared the composition of the Federal Elections Commission unconstitutional by virtue

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solely of Madisons statement in Federalist Papers #47, (at 424 U.S. at 120. 96 S.Ct at 683 (and footnote 159) We assert Federalist Papers #57 (quoted above) should have the same effect. Besides, the *idea fixe* that wealth should not be a requirement to be President is deeply ingrained. It is said of every baby, no matter how humble his/her parents station, it could grow up to be President.

Running the gauntlet of obtaining ballot access in all States is no mean feat, in view of manpower requirements and cost. The New York Times reported that cost as follows, [36]

"Mr. Perot, a Texas Billionaire, almost single-handedly financed the task of placing either the party or an independent candidacy on the ballot in all 50 states at a cost of $8.7 million, Mr. Verney said."

Television is today the only effective means of communication in a 70 day primary period for fifty states. That cost many times more than $8.7 million. The public perception is that this money is probably raised by "quid pro quos". The other candidates had available to them free television time and we were totally denied it, by incipient governmental ("presidential") power and clearly by virtue of federal statute. As Broadcaster's "free speech", it was partisan and a campaign contribution "in kind", to the included candidates, but we'll bet it wasn't reported to the FEC and the expenses not deducted from their taxes.

The entire Federal Communications Act abridges a candidates right to communicate over the television airwaves. The assignment of all of the television airwaves to the broadcasters leaves no effective mode of communication open. A candidate must buy back at enormous prices, that which the government gave away exclusively to the broadcasters for nothing. Worst, the Federal Communications Act, 47 USC Sec. 315 denies fairness solely to those whom, in the subjective judgment (or calculated self-interest) of the Broadcasters, are not "news" or "newsworthy". This Orwellian phrase ultimately translates as either "wealthy" candidates like Mr. Perot, Forbes

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[36] Sunday, January 26th 1997, National section, page 14, col.1 Article by-Line Kevin Sack):

and others or to those whom the public perceives sell government favors for contributions; a perception abundantly justified. [37]

Anyone around politics awhile knows (as Amici McCarthy's book relates) that the "news" exception is an anti-insurgency provision, designed to protect incumbents. ("An incumbency protection Act" as Harold Ickes called the election laws in the N.Y. Times.) It is of a type American Party of Texas v. White supra and, Williams v. Rhodes, supra struck down.

We adopt two books by legal scholars, which are exclusively devoted to one of our First Amendment contentions in this litigation as a part of this brief and urge their reading. Capsulated, both essentially set forth that the "neutrality doctrine" of the First Amendment requires televised candidates debates.

The Irony of Free Speech by Owen M. Fiss, Sterling Professor of Law, Yale Law School, Publisher Harvard Univ. Press 1997

Democracy and the Problem of Free Speech by Cass R. Sunstein Karl LLewellyn Professor of Jurisprudence, University of Chicago, Law School, Publisher The Free Press 1995

Both professors fix, as there starting point, as do we, that the purpose of the "free-speech" is to achieve, what Professor Sunstein calls Brandeis's "deliberativeness" and Professor Fiss calls, an "essential for collective self determination". We refer to above by the name Locke, Jefferson, Madison and Brandeis referred to it above, as "reason"; the alternative to which is "force", which lies behind the entire design of our Constitution.

Prof. Bert Neuborne, previously the Constitutional election law specialist for the ACLU, testifying before the House subcommittee on the Constitution, on the proposal to amend the First Amendment, to undo what some think (and he debunks) Buckley vs. Valeo holds, explained as follows.

Here, or when in Court, arguing a case, no side could complain that his "free speech" rights were being abridged, when he had to wait his turn while opposition counsel spoke. The right to shout out at the same time, results in no one being heard. Nor would it be "neutrality" for this court to arrange a hearing at

[37] See The Buying of the President by Charles Lewis and the Center for Public Integrity, Publisher Avon Books 1996

which either side could not be heard. Neutrality here favors the electorate hearing the full argument from all candidates.

Professor Neuborne suggests posing the issue to this Court as to whether Roberts Rules of Order contravenes the First Amendment. Or does it not make possible those rights? When the free speech rights of one or more persons is asserted and are in conflict, an orderly and effective way for both to be fulfilled, is required. Would it be constitutional to amend the Rules of Civil Procedure with a like "news" exemption (applicable solely to Respondents, as "front-runners") to your fairness rules? Not permitting you to hear arguments from some Petitioners wouldn't provide fairness to them or you in resolving issues. Why should the electorate, in making important and basic decisions be denied information, anymore than you should?

POINT TWO -A

AIRWAVES, HISTORICALLY BEEN PUBLIC FORUMS

The 1994 decision below [38] distinguishes between broadcasters; holding only publicly owned television stations as "public forums" and others not. Why the "forum" turns on the nature of the terminable licensee, and not on the public ownership of the airwaves, nor the rights of the linked set owners, was not explained. Why the focus was not on the historic public ownership of a nations transportation-communications network, (pages 14, supra,) nor on the public need for information to have free elections is not apparent. At issue is an opening in broadcast time, that at worst delays a Broadcaster's other broadcasts. But to a candidate, its a vital communications link with the electorate.

But taken on its terms as primarily a free speech question, concerned with who the temporary licensees of the airwaves were, we examine it. The doctrine of "Public Forum" was derived in Hague v. Comminee for Industrial Organization" [39], from the "trust doctrine" as to streets and parks: You said:.

[38] Forbes v. Arkansas Education Television Communication Network Foundation, et al KHBS TV, KHOG TV; American Broadcasting Company 22 F3d 1423, (8th Cir 1994) Cert. denied. 115 S.Ct. 1962, (U.S. 1995) 131 L.Ed.2d 853, 63 USLW 3812, 63 USLW 3817 No. 94-1566. May 15, 1995.

[39] 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (U.S.N.J. 1939)

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[40]

We have previously argued that a "public street" is one that provides transportation and thus communication, tying a community together. The "trust" is created when people buy lots laid out along a street, creating private easements of light, air, view, prospect and access (ingress & egress) in the streets, public squares etc. streets, etc.; after which the government comes and subjects same (without 5th Amendment compensation, because not extinguishing them) to "public easements", but subject to a trust. The reason that Public squares became "Hyde Parks" is that the private easements, now subjected to the public easements, retains rights of each abutter and it is this community-wide interdependent benefit and dependence that creates the trust. The same is obviously true of monopolized "airwaves"[41], where 200 billion dollars of private television sets depend on them.

POINT THREE

DEBATE EXCLUSION VIOLATES THE "EQUAL PROTECTION" (AND ESTOPPEL PRINCIPLES).

The decision appealed from[42] holds that the "equal protection" clause requires access of all candidates to television debates held by a public broadcasting company. It rejects the argument that they or anyone should make such a content determination based on the broadcaster claims to be able to determine for the electorate who it should and shouldn't consider.

The potential awesome power of the Presidency and the way politics works, was to some degree, responsible for the deprivation of Amici's rights. Incontrovertibly, media access

[40] Had the speakers addressed the people in a park with a bullhorn or loudspeaker it wouldn't change the "public forum" nature of the park..

[41] Former Senator Robert Dole made the point in an Op-Ed article on page A-23 of the New York Times of Thursday March 27th 1997

[42] Ralph P Forbes v. The Arkansas Education Television Commission et al KHBS TV, KHOG TV; American Broadcasting Company 24 Med L. Rep 2295 No 95-2722WA August 21, 1996

determines who will be President. Assuming perfect innocence it must have passed through Media's heads that by making a person President they might create a "chit" (to use the political expression)? That Clinton "would owe them one". Let us borrow another's statements. Boyden Gray, White House counsel under President Bush, on McNeil-Lehrer hour on Thursday March 6th, though otherwise uncritical of the fundraising practices of the Clinton Whitehouse, said that just because of the power of the President over the FCC, there should be a Congressional investigation to see if there was a "quid pro quo". He went on to talk of the billions of dollars at stake for Media in the Communications Act, enacted under Clinton. David Broder's previously reported in the Washington Post, that the Clinton Administration was advocating the FCC to give additional frequencies, worth what Senator Dole, in his above referred to NY Times Op-Ed piece said was worth seventy billion dollars, to the media for nothing. President Clinton thereafter publicly called for requiring free television time for "candidates", something, it's agreed, Congressional incumbents will never do.

Was this not liken, to Professor Williston's classification, of a Unilateral Contract Type II, a consideration in exchange for a promise? The power of the government is inherently involved in the deprivation of excluded candidates Constitutional rights. Such power abridges "free speech" rights of excluded candidates?

Even private property, "serving a government function", implicates the "Equal Protections" clause and the "public airwaves" are not private property. When broadcasters pretend impartiality and say they are conducting a non-partisan debate to assist the public in deciding how to cast their vote, as a public service, as they always do, they should be held to their own offer and representation and not be permitted to feign non-partisanship, favor some of the candidates and discriminate against others. Not because it's fraud, which it is,[43] but because an equity court should estop them. Having conscripted themselves to serve the public, and deterred government from

[43] Not once, in debates from which Amici was excluded, or we are advised in Forbes, did the Broadcasters even suggest that they were presenting less than all the candidates. Theres no way to fight this back.

doing what they originally did, they should do so in the expected required neutral manner, not as a partisan.

This estoppel argument should be differentiated from that which we shortly discuss, that of a "state-actor", where the broadcaster becomes an integral part of the primary election process, as an aid to voters, again relieving the State from attempting to provide a candidates forum for the voters[44]

POINT THREE-A

"STATE ACTOR","GOVERNMENTAL ACTOR" DOCTRINE

A functionary in the conduct of an election is a "state actor" or "governmental actor", under the 1st and 14th amendments. The Smith v. Allwright,[45] holding as to political parties in the primary election process, applies as to broadcasters.

A broadcaster may also be a "governmental actor" or "state actor", under Columbia Broadcasting System, Inc. v. Democratic Nat. Committee,[46] (3 Justices holding the Broadcaster there was not). There, organizations opposed to the Vietnam war sought to buy air-time to run spot advertisements opposed to the war and C.B.S. refused to sell it to them or any

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[44] As stated in Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (U.S.Ill. 1980) Decided June 20, 1980:

> "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Id., at 95-96, 92 S.Ct., at 2290. (citations and footnote omitted).

[45] 321U.S.649, 64S.Ct.757, 51A.L.R.1110, 88L.Ed.987 (U.S.Tex.1944)

[46] 412 U.S. 94, at 115, 93 S.Ct. 2080 (U.S.Dist.Col. 1973), 36 L.Ed.2d 772, 1 Media L. Rep. 1855 Decided May 29, 1973.

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advertiser, but previously had programming on both sides of the issue. The request was for broadcasting an informational message, was not made for use in an electoral campaign, nor were remaining means inadequate, nor a media blackout impeding a candidates communication with the voters or other wise was it a "state actor". Since there was no majority or even plurality opinion for whether there was "state action", the holding of the case is simply that, in a non electoral setting, a uniform policy by a broadcaster to refuse paid editorial advertising for a message, on an issue already frequently covered by the broadcaster, was not State Action.

In no case, including the above, has this Court held that the role of a broadcaster, in an election debate is not that of a "public actor". Smith v. Allwright, supra makes quite clear that it is. Previously in Nixon v. Herndon[47] Texas's primary law was struck down because it excluded Afro-Americans. Texas therefore relinquished control over the primary to the Democratic

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These three judges said:

> "The Court of Appeals held that broadcasters are instrumentalities of the Government for First Amendment purposes, relying on the thesis, familiar in other contexts, that broadcast licensees are granted use of part of the public domain and are regulated as 'proxies' or "fiduciaries' of the people.' 146 U.S.App.D.C., at 191, 450 F.2d, at 652. These characterizations are not without validity for some purposes, but they do not resolve the sensitive constitutional issues inherent in deciding whether a particular licensee action is subject to First Amendment restraints. (FN14)
>
> "In dealing with the broadcast media, as in other contexts, the line between private conduct and governmental action cannot be defined by reference to any general formula unrelated to particular exercises of governmental authority. When governmental action is alleged there must be cautious analysis of the quality and degree of Government relationship to the particular acts in question. 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.' Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 860,

[47] 273 U.S. 536 (1927).

Party, who made a regulation excluding blacks. The Smith Court held taking the function of the State makes one a "state actor".

Imagine that a convention system had been employed and the Democratic Party contracted out with a private party to provide the sound system for the gathering. Imagine further that he refused to allow Afro-Americans to talk into the microphones so they couldn't participate and he would only carry speeches of whites. No doubt taking that function of an election makes him a "state actor".[48] Substitute ear-phones, radio or television for loudspeakers changes neither the function or thus the result.

But Smith, supra, which is right on point should be followed. The Broadcasters chose to be the sole means of communication and became "State Actors"

POINT FOUR

"SIGNIFICANT" AND/OR "MAJOR CANDIDATE" IS NOT A VALID GROUND FOR EXCLUSION.

The standard media excuse, lack of "significance", held below and in LaRouche v. Kezer,[49] and Fulani, v. Brady[50] to be, subjective and meaningless terms is no basis to deprive the voters from making that judgment nor deny a candidate the right to make himself "significant". The thousands of reform club members represented in the NDC Delegate Assembly, who overwhelmingly endorsed Amici, has for 40 or more years been in the business of selecting statewide candidates, most of whom they make win. They overwhelmingly found Amici "significant"" and "electable". This is their hobby or business. When Media's

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[48] The 2nd circuit stated in Lebron v. National R.R. Passenger Corp. (Amtrak),:

> "As the Supreme Court has noted, "formulating an infallible test" of government action is an " 'impossible task.' " Reitman v. Mulkey, 387 U.S. 369, 378, 87 S.Ct. 1627, 1632, 18 L.Ed.2d 830 (1967) (quoting Burton, 365 U.S. at 722, 81 S.Ct. at 860). Rather, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton, 365 U.S. at 722, 81 S.Ct. at 860."

[49] 787 F.Supp. 298, (U.S.Dist.Ct., D. Conn. Feb. 28, 1992. Memorandum Decision on Motion for Reconsideration March 9, 1992.

[50] S.D.N.Y. 809 F.Supp. 1112, Jan. 5, 1993

expertise was questioned, they told Meyrowitz, they got advice from an unnamed national party official, whose claim to such "forecasting ability" at such early stage and from such vantage point is pure nonsense. (& violates party rules, cf see footnote 1).

Ross Perot, Malcolm Forbes and Michael Huffington were recently deemed "significant" by the press; all previous unknowns. A very high percentage of Congressional candidates have been millionaires. Since that type of money is needed for communications, the circular nature of the proposition is obvious. A candidate can get the right to communicate, if he already has it. Others are perceived to sell their votes for "warchests". Ben Franklin's answer to the "type of government wrought" question is now : "It's a plutocracy, if you can keep it."

The halls of government are filled with candidates for every office, who started as unknowns and didn't become "significant" or "major" till they obtained media exposure. Excluding candidates assures they will remain "insignificant".

POINT FIVE

THE 47 USC 315 "NEWS" EXCEPTION DENIES "EQUAL PROTECTION"

As applied the misnomered "fairness" provision of the Federal Communications Act, Section 315, provides for unfairness and inequality of access. See decisions discussed in The Ultimate Tyranny, etc. supra. It institutionalizes unequal treatment by exempting "news" which has produced rulings that those in the lead in the mythical horserace are "news" and entitled to unequal treatment. It's exemption of "news" from the "equal protection" clause is, within the context of presidential debates, an unequal preference to the assumed "lead" candidates and those of the major parties.

"News", to the media and the press, is not synonymous with information, at least not the type envisaged by this courts decisions, cited in Point I. It is not the information that voters need in voting. "News", to the media, is when a man bites a dog. It is not "news" when a dog bites a man. It is "news" when one plane crashes, but not when a thousand take off and land safely in one day. It is the unusual, and the peculiar that is "news". What is pernicious about Section 315 is that media treat presidential politics as a "horse race"; "news" being solely as the

doings of the leading candidates. Thus section 315 exempts major party or "lead" candidates from the equal protection clause.

Professor Meyrowitz reports Chris Black's (of the Boston Globe) telling explanation of the difference (pg 59):

> "Ultimately, were in the news business...Our role is to report the news, not just information..."

The decisions saying truth chases out falsehood, that the solution to false opinions lies in more speech state an objective, not always achieved. Likewise, as to the goal that candidates compete with ideas, program, qualifications. As Professor Meyrowitz concluded, the public believes, wants and expects that, (pg 46) but that's not the way the media sees it and thus not the way it works. That's what differentiates views of media, from the views of the public at large. Meyrowitz concludes pg 48:

> "Another factor is the varying conception of "what a presidential campaign is all about". Generally, the public logic I heard expressed–at campaign events, in casual conversations, in newspaper reports on public polls and the "public mood", in letters to the editor, and in my classes--revealed voters hungry for candidates with new ideas for solving our country's problem. Public logic generally sees a presidential campaign as fostering a dialogue on key issues. But the national journalists I spoke with mostly saw the campaign as a horse race".

Direct candidate access is required to have free elections.

CONCLUSION

THE JUDGEMENT BELOW SHOULD BE AFFIRMED, AND MADE APPLICABLE TO ALL BROADCASTERS.

May 14, 1997 RESPECTFULLY SUBMITTED,

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